

DIGITALEUROPE calls for further harmonisation of collective redress mechanisms in Europe

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On 11 April, the European Commission released its New Deal for Consumers package, which includes a proposal for a Directive on representative actions. DIGITALEUROPE welcomes the Commission's efforts to improve consumers' access to justice through further harmonisation and unification of EU consumer enforcement law. DIGITALEUROPE recognises the need to equip European consumers with costs effective and easy means of redress and by no means does it aim at challenging the existence of representative actions across Europe.

Unfortunately, DIGITALEUROPE regrets that many of the Commission's own safeguards set out in its own 2013 Recommendation to Member States have been omitted. These include the capacity and expertise of qualified entities, admissibility standards, and loser pays principle, limitations on contingency fees, the necessity of the "opt-in" principle, and a ban on punitive damages. Our membership believes that the proposed Directive will fail at establishing a coherent and harmonised set of rules for collective redress, further fragmenting the internal market, missing an opportunity to improve legal certainty for consumers and businesses, as well as opening the door to abusive US-style litigation.

1. Coherent and further harmonised set of rules across the EU for representative actions (Articles 1 to 3)

DIGITALEUROPE welcomes the Commission's initiative to improve the quality and coherence of existing national collective redress mechanisms in Europe. We understand that the proposed Directive establishes common rules for enabling qualified entities to seek representative actions for the protection of the collective interests of consumers in Member States and that it does not intend to set up another court mechanism for the enforcement of the rights of individual consumers.

Our members regret that the Commission's proposal will enable Member States to maintain radically different collective redress systems, promoting forum shopping and increasing confusion for cross-border cases for consumers, businesses, qualified entities, lawyers, administrative authorities and courts. DIGITALEUROPE urges EU policymakers to encourage further harmonisation of rules for representative actions, providing involved stakeholders with more legal certainty and facilitating the consumers' access to such mechanism.

DIGITALEUROPE wants to avoid representative actions being brought forward simultaneously in multiple Member States against the same trader, for the same alleged infringement, or even in the same Member State but by different claimants. In this context, we recommend that courts make a thorough assessment of the admissibility criteria for the qualified entities to bring the representative action. It should also be clear that when collective action is pending, all individual claims by the consumers should be precluded, but that consumers can join the class action at any time before the final proceeding. This would prevent any abusive or duplication of litigation.

In regards to the scope, DIGITALEUROPE has spotted some contradictions and recommends that EU policymakers further investigate potential risks for the proposed Directive to overlap with existing collective redress systems at national level – as is the case with the recent German collective redress mechanism. We also encourage reassessing the consistency with Annex 1 of the proposed Directive which we believe may result in conflicts with other EU rules. These include Article 80 of the General Data Protection Regulation (GDPR) or incoherence such as when the infringement cannot be characterised, which is the case in the Product Liability Directive. We worry that such overlaps will prevent traders from reaching settlements in the consumers’ benefit.

We also call on EU policymakers to further refine the definition of a “trader” as we believe there is a risk that a manufacturer becomes liable for conduct of the distributor of its products or services, while being entirely independent for determining its market conduct.

2. Stricter admissibility requirements, criteria and funding requirements for qualified entities (Articles 4 and 7)

Admissibility requirements

DIGITALEUROPE considers that one of the best safeguards against abusive litigation and forum shopping would be for the EU to define admissibility requirements for representative action cases. Our members believe that this would also help further harmonise the use of existing mechanisms in Member States by providing courts and administrative authorities with the same requirements to accept or dismiss the case, speeding up the hearing process for the consumer.

In this context, we would like to suggest EU policymakers the following admissibility requirements for representative actions:

- Representation action should be only possible if brought on behalf of a critical and identified number of consumers: DIGITALEUROPE recommends legislators to set a European threshold to define what a critical number of consumers affected by the alleged infringement should be. Such threshold would be easily ascertainable by the courts if consumers are obliged to give mandate, in written, to qualified entities for their representation.
- Qualified entities should prove their legitimate interest and lack of conflict of interest to launch a representative action: DIGITALEUROPE believes that court should have the obligation to assess whether the qualified entity has a legitimate interest in protecting the consumers’ collective interest, whether it has been duly formed and whether there is a conflict of interest with the defendant before they accept a case in order to prevent the creation of fictitious entities and abusive litigation.

DIGITALEUROPE would also suggest policymakers to set a maximum two-year deadline for courts across Europe to assess the admissibility of the procedure.

Article 4 and 7 – Criteria for establishing and funding qualified entities

In addition to the admissibility requirements, DIGITALEUROPE urges EU legislators to set up a mandatory and non-exhaustive list of criteria for establishing qualified entities at national and EU level that will be able to launch representative actions in the EU. The current proposal contains no safeguards of any kind on qualified entities’ knowledge, capacity and experience, its governance, or possible incentives to conduct litigation. Such list would

therefore be another safeguard to prevent from abusive litigation, forum shopping and the creation of fictitious entities. It would also avoid a legal framework resembling the United States' class action system which ultimately benefits those carrying out litigation, such as law firms, but does not provide adequate redress to consumers themselves.

DIGITALEUROPE would like to suggest the following mandatory and non-exhaustive list of criteria for qualified entities:

- Qualified entities entitled to bring representative actions under the proposal should be limited to independent public bodies and consumers organisations, excluding business associations and third parties with commercial interests in the matter.
- Qualified entities should have a legitimate interest to represent the collective interest of consumers, which should be the sole basis for collective claims on behalf of consumers.
- Qualified entities should be accredited by national governments or the European Commission in order to be able to bring representative actions.
- Qualified entities should be non-profit legal entities.
- Ad-hoc qualified entities must be funded by a state-delegated qualified entity.
- Qualified entities willing to launch a representative action should have at least 2 years of existence, in order to avoid the creation of fictitious entities and ensure that the representative action aims at protecting the collective interest of consumers .

3. Opt-in model, information on representative actions, compensation and other redress measures (Articles 5, 6 and 9)

DIGITALEUROPE regrets that the Commission went for minimum harmonization and adopted a neutral position on the principle for collective redress. We firmly believe that facilitating Member States to keep, modify or add an alternative to their mechanism, will further fragment the internal market and confuse affected stakeholders about the action and redress possibilities.

We recommend legislators and Member States to adopt the “opt-in” principle to collective structures as the majority of countries with collective redress regimes already adopted it and that it seems to be the best mechanism to prevent abusive litigation. It would simplify the monitoring of admissibility requirements by asking consumers to give a written mandate to the qualified entity, giving it a reason to launch a representative action on behalf of consumers. As explained by the Commission in its Report on the implementation of 2013 Recommendations on collective redress, the so-called “opt-out” mechanism is considered as problematic in certain circumstances, and in particular in cross-border cases. Should “opt-out” be considered by legislators, DIGITALEUROPE recommends that it is only made available when brought by an independent public authority.

However, DIGITALEUROPE believes that, in addition to clearly endorsing the opt-in principle, the proposal should contain additional safeguards to ensure that the mechanism is used in the benefits of the consumers:

- Qualified entities should be obliged to publish information about ongoing collective redress proceedings on their website, continuously informing concerned consumers and facilitating the distribution of redress;
- Ministries of Justice should be required to publish a statement informing about the commencement of a collective redress proceeding in their country;
- Consumers should be able to opt-in or decide to abandon the case at any time before the final proceeding.

We strongly recommend prohibiting third parties to undertake publicity campaigns as they foster negative reputational damage for companies before the final judgement. In certain cases, such as in the United States, we have seen that these are often run by competitors.

We also believe that it is important to ensure that qualified entities would not be permitted to seek an interim injunction against a trader without showing any loss or damage by the claimants and without showing any intent or negligence by the trader. It might be that the trader did not violate any rules, so the trader should not be obliged to stop the practice until it was not proved otherwise.

Furthermore, DIGITALEUROPE calls on EU policymakers to clarify what “public purpose” means in Article 6(3)(b) and recommends it is approved by courts. In the first instance, we would recommend that redress goes directly to identifiable consumers – which should be the overall objective of this legislation.

4. Settlements (Article 8)

DIGITALEUROPE urges policymakers to promote and consider the possibility of making out-of-court settlements mandatory prior to a representation action, as they provide the qualified entities and consumers with the prospect of a quicker and more effective result. We believe that parties should be explicitly encouraged in the proposal to settle compensation disputes as a first step before approaching courts. Courts and administrative authorities should have the obligation to explain the advantages of voluntary dispute resolutions and present the existing solutions at national and EU level, such as under the Directive on Alternative Dispute Resolution (2013/11/EU, ADR).

DIGITALEUROPE calls for clarification that if a consumer agrees to be bound by the settlement, he or she should be deemed to have waived their other rights against the same trader, for the same infringement in any Member State. Consumers are more likely to settle, as there is a higher certainty that they will collect the compensation they are entitled to, with fewer expenses and less stress.

We also urge the deletion of the provision in Article 8 (1) which provides that a collective settlement can only be approved if there is no longer any other representative action pending before the courts of the same Member States, which prevents consumers from getting a quick redress. In this context, DIGITALEUROPE raises concerns that the proposal might conflict with Article 80 of the GDPR, or other legislation and proposals in discussion that also allow for collective action. The provisions in these legislations are not detailed and can lead to the prevention for a trader to reach a settlement. Settlements should be encouraged as a first action in order to ensure that consumers receive redress rather than leading to protracted litigation proceedings.

5. Effects of final decision (Article 10)

DIGITALEUROPE believes that Article 10 should be clarified seeking to avoid contradictory decisions from different Member States. It should also prevent representative actions from being brought at the same time in multiple

Member States against the same trader for the same alleged infringement, or even in the same Member State but by different claimants. We also recommend explaining in recitals that the trader who successfully defends a claim would be able to use this as irrefutable evidence in another jurisdiction.

6. Evidence (Article 13)

While DIGITALEUROPE considers that obligations to provide evidence and information have to be limited in scope to protect trade secrets, it also believes that Article 13 is unusually skewed in favour of qualified entities as it provides a one-sided approach to the provision of documentary evidence. This could eventually be contrary to Article 6 of the ECHR and Article 47 of the Fundamental Charter.

Furthermore, Article 13 refers to Member States' national procedural law and grants regulatory powers to qualified entities. This provision mirrors the US Federal Discovery and may lead to proceedings being launched in order to make use of this Discovery and achieve a rapid settlement. We do not believe that Article 13 would grant balanced rights to qualified entities and should be deleted in order to avoid abusive practices. If this option is not taken, then national courts and administrative authorities must ensure that the evidence requested is proportional and narrow in scope to the harm being assessed.

7. Assistance for qualified entities (Article 15)

DIGITALEUROPE believes that the possibility to provide qualified entities with public funding would divert resources from local regulators and consumer protection authorities already able to carry out collective action on behalf of consumers. This duplication may lead to competition for resources or scarcity for the same financing, thereby weakening existing consumer protection authorities and local regulators in Member States.

8. Cross-border representative actions (Article 16)

In order to prevent the uneven proliferation of proceedings, DIGITALEUROPE urges policymakers to ensure that Member States outline that qualified entities must have already obtained a final decision from a court or administrative authority in their own Member State before applying to the courts or administrative authorities of another Member State. Our organisation urges policymakers to ensure that the proposal provides a reciprocal right to the defendant to seek evidence in the possession of the claimant entity.

ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies. DIGITALEUROPE ensures industry participation in the development and implementation of EU policies.

DIGITALEUROPE's members include in total over 35,000 ICT Companies in Europe represented by 63 Corporate Members and 39 National Trade Associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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